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T.C., Appellant)	
)	
and)	Docket No. 20-1536
)	Issued: April 23, 2021
DEPARTMENT OF VETERANS AFFAIRS, VA)	
SALT LAKE HEALTHCARE SYSTEM,)	
Salt Lake City, UT, Employer)	
)	

Case Submitted on the Record

Office of Solicitor, for the Director

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On August 17, 2020 appellant, through counsel, filed a timely appeal from a February 19, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days has elapsed from OWCP's last merit decision, dated January 28, 2019, to the filing

² Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, he asserted that oral argument should be granted because counsel sought to provide clarification between employees not getting along in the workplace, supervisors performing their regular supervision, and administrative misfeasance, which affects the work environment. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 23, 2018 appellant, then a 61-year-old registered respiratory therapist, filed an occupational disease claim (Form CA-2) alleging that he developed headaches, anxiety, and increased Crohn's symptoms due to factors of his employment. He first became aware of his conditions and realized their relation to factors of his federal employment on December 18, 2017.

In a development letter dated May 31, 2018, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the factual and medical evidence necessary to establish his claim and also provided a questionnaire for completion. In a separate letter of even date, OWCP requested that the employing establishment provide details related to appellant's claim and whether they concurred with his allegations. It afforded both parties 30 days to respond.

OWCP received a May 25, 2018 report from Dr. Michael P. Schaelling, a Board-certified family practitioner, who treated appellant for migraine headaches and major depressive disorder.

In response to OWCP's development letter, the employing establishment submitted a June 4, 2018 memorandum from J.E., an administrative officer, who indicated that appellant complained of stress leading to increased anxiety from accusations made by another employee. Appellant's case was investigated, fact finding was performed, and a proposed suspension as to appellant was found to be appropriate. The proposed suspension was upheld by the chief of staff and appellant responded with an e-mail to S.S. dated May 15, 2018, expressing anger and protest.⁴ J.E. noted that appellant was not required or asked to work overtime, there were no deadlines, no travel, no intense assignments, no staff shortages, or extra demands. He indicated that appellant had conduct problems and filed the Form CA-2 after his suspension was upheld. J.E. advised that appellant was provided accommodations as he was removed from the in-patient respiratory department and started working in the sleep outpatient center and his schedule changed from 12.5 hours per shift to an 8-hour shift. By moving appellant to the sleep outpatient center he was removed from the respiratory therapy staff, which was the source of his stress. OWCP received a job description for a registered respiratory therapist.

In response to the development letter, appellant submitted a June 14, 2018 statement of complaint. He indicated that in August 2016 he requested leave under the Family and Medical

³ 5 U.S.C. § 8101 *et seq.*

⁴ Appellant sent the May 15, 2018 e-mail to S.S., his supervisor, and vehemently disagreed with content of the proposed one-day suspension and the chief of staff's decision to uphold the action. He indicated that he would take the one-day suspension on May 16, 2018 under protest. Appellant asserted disparate treatment and indicated that he would seek counsel.

Leave Act (FMLA) for his service and nonservice-related disabilities of tinnitus, migraine headaches, vertigo, and anxiety. Appellant requested disability accommodations from his supervisor S.S., including reduction in noise levels in the department, specifically from a coworker, T.L., and low or dimmable lighting. In 2017 the noise increased and he personally asked T.L. to quiet down. In November 2017 appellant asserted that T.L. filed a fictitious complaint against him, which increased his anxiety. On December 22, 2017 he took FMLA leave to care for his wife who was undergoing hip surgery and he needed time away from the stress. Appellant returned to work six weeks later with moderate anxiety due to high noise levels and he experienced migraine headaches weekly. On March 19, 2018 he met with the chief of staff who upheld the proposed one day suspension. Over the next few weeks appellant's symptoms were intermittent. On April 19, 2019 he again met with his chief of staff and alleged disparate treatment due to age and proximity to retirement, and asserted that the proposed suspension was without merit. On May 7, 2018 appellant was informed that the suspension was upheld where he experienced anxiety, shortness of breath, dizziness and tinnitus. On May 15, 2018 he informed S.S. that he would serve the suspension on May 16, 2018 and sent a "non-threatening" e-mail to S.S. and the chief of staff expressing disagreement with the suspension. On May 22, 2018 S.S. called him into his office and informed him that the e-mail was perceived as threatening and he would be detailed out of the department. Appellant believed he was being harassed by being detailed to another area. He alleged that T.L. blurted out an offensive statement to him.

In a separate statement dated June 14, 2018, appellant asserted that most of his conditions were the result of maltreatment and persecution from his former manager J.E. In September 2013 he requested service-connected accommodations for lower noise levels and low lighting, which never came to fruition under J.E. Appellant reiterated that he was not properly accommodated, he was subject to a retaliatory and false complaint from T.L., discriminated against based on age, and verbally abused by T.L. He reported no outside stress except an automobile accident on October 22, 2017. Appellant noted that he did not have other jobs and he had been treated for depression on and off for 15 years.

Appellant submitted a memorandum to management dated July 10, 2018, requesting leave under FMLA from July 9 through August 26, 2018, due to migraine headaches, which was approved. OWCP received medical evidence from Dr. Schaelling dated July 10, 2018.

OWCP received a July 31, 2018 memorandum from the employing establishment's director pertaining to the proposed removal of appellant due to the threatening e-mail sent to management on May 15, 2018. Also submitted was an alternative discipline agreement entered into on August 7, 2018, in which appellant was offered a final opportunity to retain employment and serve a 14-day suspension.

OWCP received an August 23, 2018 memorandum from S.S., who addressed appellant's stress allegations. S.S. noted being appellant's supervisor since August 2014. He reported having one conversation with appellant regarding dimmable lighting and noise where he requested to sit in another room with the lights dimmed until his migraine passed. S.S. indicated that appellant did not request reasonable accommodations or provide documentation stating restrictions were necessary to return to work. He reported several instances of conflict between appellant and his

coworkers.⁵ SS. advised that there were no changes in appellant's work environment that would cause stress, his workload had not been altered, he was not required to work mandatory overtime, and staffing levels and workload were consistent with no extra demands placed on him.

OWCP received an e-mail from appellant dated August 24, 2018, which requested leave without pay (LWOP) from August 26 through October 22, 2018, due to leave used under FMLA exceeding 480 hours. Appellant submitted an August 21, 2018 statement from Dr. Schaelling in support of his request.

In a September 4, 2018 statement, appellant reported being detailed to a nonclinical position as punishment. He indicated that in 2016 he was out on FMLA for treatment of migraines, vertigo, anxiety, and chest pains and verbally requested reasonable accommodations several times. Management did not provide accommodations and he was placed "in harm's way" working in front of computer monitors for extended hours and taking telephone calls, which exacerbated his conditions.

On September 6, 2018 S.S. advised appellant that on August 31, 2018, he exhausted all 480 hours of FMLA afforded to him and beginning September 16, 2018, he would no longer approve LWOP due to staffing shortages in respiratory therapy and he would be charged with absent without leave (AWOL).

On November 27, 2018 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions to Dr. Peter Heinbecker, a Board-certified psychiatrist, for a second opinion evaluation to determine the nature of his condition, the extent of disability, and appropriate treatment. In a report dated December 15, 2018, Dr. Heinbecker diagnosed major depressive disorder, in partial remission, and adjustment disorder with mixed disturbance of emotion and conduct. He opined that appellant's work-related condition improved, but he could not return to his date-of-injury job because the environment would exacerbate his underlying symptoms.

In a January 28, 2019 decision, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that he sustained "an emotional condition that arose during the course of employment and within the scope of compensable work factors as defined by FECA."

On January 24, 2020 appellant, through counsel, requested reconsideration. In a letter dated January 22, 2020, counsel provided a procedural history of appellant's case beginning with filing a Form CA-2, OWCP's development letters to appellant and the employing establishment, appellant's June 14, 2018 responses to the development letter, and the January 28, 2019 OWCP decision. He noted his disagreement, but didn't make specific arguments.

By decision dated February 19, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁵ The instances of conflict were: September 2014 tension with D.A., which impacted patient care; a December 2015 allegation of unwanted touching by T.L.; an August 2017 disruptive behavior report filed by a police officer; an October 2017 allegation of verbal abuse by a coworker; a November 2017 inappropriate comment to a coworker about their daughter; a May 15, 2018 e-mail from appellant perceived as threatening; a May 2018 incident in which appellant alleged he was referred to with a derogatory comment by T.L.; and a June 2018 written notice of proposed removal from the employing establishment where he was offered a last chance agreement with a 14-day suspension.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his or her own motion or on application.⁶

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁰

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

With his January 24, 2020 request for reconsideration, appellant submitted a letter dated January 22, 2020, which provided a procedural history of his case beginning with filing a Form CA-2 through the January 28, 2019 OWCP decision. Counsel noted his disagreement, but did not make specific arguments. His reconsideration request does not advance a new legal argument not previously considered, nor show that OWCP erroneously applied or interpreted a specific point of law. The Board finds that the argument made by appellant on reconsideration was cumulative, duplicative, or repetitive in nature and was insufficient to warrant reopening the claim for merit

⁶ *Supra* note 3 at § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

⁷ 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id.*; *see also K.L.*, Docket No. 17-1479 (issued December 20, 2017); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁸ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *M.S.*, Docket No. 19-0291 (issued June 21, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

review.¹¹ Thus, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹²

Furthermore, the Board finds that appellant submitted no pertinent and new evidence in support of his request for reconsideration.¹³ Thus, appellant is also not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(3).¹⁴

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁵

On appeal counsel argues that he requested a copy of the case file from OWCP on January 22, 2020; however, OWCP did not respond to the request and as a result he could not further develop the request for reconsideration. The Board finds, however, that this argument is not relevant to the underlying factual issue of the present case, *i.e.*, whether appellant established an emotional condition causally related to a compensable employment factor. As explained above, he has not shown that OWCP erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered by OWCP, or constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁶

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹¹ *J.V.*, Docket No. 19-1554 (issued October 9, 2020); *see T.B.*, Docket No. 16-1130 (issued September 11, 2017).

¹² *G.Q.*, Docket No. 18-1697 (issued March 21, 2019); *Alan G. Williams*, 52 ECAB 180 (2000).

¹³ *See F.D.*, Docket No. 19-0890 (issued November 8, 2019).

¹⁴ *T.M.*, Docket No. 19-0535 (issued July 25, 2019).

¹⁵ *See S.M.*, Docket No. 18-0673 (issued January 25, 2019); *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

¹⁶ *Supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 23, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board